BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID J. HEAPE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,263
CITY OF GREAT BEND	)	
Respondent	)	
	)	
AND	)	
	)	
KANSAS MUNICIPAL INSURANCE TRUST	)	
Insurance Trust	)	

ORDER

Claimant appealed the October 5, 2009, Preliminary Hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant requests medical benefits and temporary total disability benefits for an alleged July 9, 2009, accident. In the October 5, 2009, Order, Judge Moore denied claimant's requests for benefits after finding claimant failed to establish that an employment relationship existed between claimant and respondent at the time of claimant's injury.

Claimant was injured during an agility test he underwent as part of the application process to become a police officer for respondent. Claimant contends the Board's reasoning in its *Hazen*[1] decision, in which the injured worker was compensated for injuries received while undergoing a pre-employment physical examination, precisely aligns with the facts in this claim. Along that line, claimant argues:

> Mr. Heape was required to pass the exam before he could be employed with respondent. Further, the physical exam took place at the respondent's training

[1] *Hazen v. Riverside Hospital*, No. 196,529, 1998 WL 100149 (Kan. WCAB Feb. 23, 1998).

> facility, on the respondent's property. The exam was conducted by police department lieutenants who oversaw the exam process. Finally, the exam was clearly for the benefit of respondent, ensuring that applicants are physically capable of handling the physical demands of police work.[2]

Claimant requests the Board to reverse the October 5, 2009, Order and to remand this claim to Judge Moore.

Respondent and its insurance carrier (respondent) contend the *Hazen* decision is clearly distinguishable and that the facts in the claim now before the Board do not establish an employer-employee relationship. Respondent argues the *Hazen* case is distinguishable as the worker had been given a conditional offer of employment before being injured during a post-offer employment physical but that in the present claim claimant had not been offered employment. Respondent maintains that no employer-employee relationship existed and, therefore, the Workers Compensation Act does not apply.

The only issue before the Board on this appeal is whether an employer-employee relationship existed when claimant was injured.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

The facts are not in dispute. Claimant applied for a job as a police officer with the Great Bend police department. On July 9, 2009, claimant fell from a six-foot wall and fractured his right leg during an agility test, which was one of several parts of the application process. Claimant was immediately taken to the Great Bend Regional Hospital, where he was admitted for treatment.

On July 9, 2009, claimant was employed by the Ellsworth Correctional Facility as a correctional officer. Since the accident, claimant has been unable to return to work.

The application process for the police officer position included several stages; namely, a two-hour written test, a physical agility test, interview, extensive background check, and offer of employment conditioned upon successful completion of a psychological profile, physical exam, and drug screening. Claimant did not make it past the physical agility test. Moreover, he acknowledges he never received an offer of employment from respondent.

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[2] Claimant's Brief at 2 (filed Oct. 20, 2009).

The principal issue at this juncture is whether claimant would be considered an employee of respondent's for purposes of the Workers Compensation Act. Before a worker is entitled to receive benefits under the Act, proof that the worker was an employee at the time of an accident is critical. K.S.A. 2008 Supp. 44-501 provides:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

The Act defines "workman," "employee," and "worker" in K.S.A. 2008 Supp. 44-508 as follows:

> (b) "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. . . .

Judge Moore denied claimant's request for benefits after finding claimant was not an employee of respondent at the time of the accident. The undersigned agrees. Claimant has failed to prove he had "entered into the employment of" or was working "under any contract of service or apprenticeship" at the time of the accident. Indeed, at the time of the accident there had been no offer and acceptance of an offer of employment. That fact distinguishes this claim from the *Hazen*[3] decision.

In summary, the evidence fails to establish a contract of employment existed between claimant and respondent and, therefore, the Preliminary Hearing Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[3] *Hazen v. Riverside Hospital*, No. 196,529, 1998 WL 100149 (Kan. WCAB Feb. 23, 1998).

[4] K.S.A. 44-534a.

WHEREFORE, the undersigned Board Member affirms the October 5, 2009, Preliminary Hearing Order entered by Judge Moore.

IT IS SO ORDERED.

Dated this ____ day of November, 2009.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Michael J. Wyatt, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Trust
Bruce E. Moore, Administrative Law Judge